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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1150

DAVID H. DURHAM, et al.,

Petitioners

v.

THE MASON AND DIXON LINES, INC.,

Respondent

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

H. SOLOMON HOREN
Kentucky Home Life Building
Louisville, Kentucky 40202

MOZART G. RATNER
818 - 18th Street, N.W.
Washington, D.C. 20006

STEPHEN D. GORDON
818 - 18th Street, N.W.
Washington, D.C. 20006

Counsel for Petitioners

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1. Respondent's claim (pp. 3, 8), that petitioners did not charge it with "fraud" was properly rejected by the court below, which explicitly found: "The complaint alleged that appellee had procured a change in the collective bargaining agreement by means of fraudulent misrepresentations to the Joint Employer Union Committee" (App. 1a, 3a; J.A. 8a, par. 20(d), 9a, par. 24, 13a).

2. The premise of respondent's revision of our "Questions Presented" (p. 2) is that the contractual grievance procedure was available to petitioners to challenge the validity of the Joint Committee's approval of the change of operations. But that premise is not, and cannot be, supported.

Article 42, Section 3, of the relevant "Supplemental Agreement," Appendix A to the Complaint, p. 60 (in the original record certified to this Court), provides for establishment by the operators and the Unions "together" of a "permanent Joint Area Committee." Sections 5 and 6 of that Article, *ibid.*, empower the "sub-committee on change of operations" appointed by that Committee to entertain employer requests for a "change of operations." Section 6 provides, in pertinent part:

> "Present terminals, breaking points, or domiciles shall not be transferred or changed without the Employer first having asked for and received approval from the sub-committee on change of operations. . . ."

Nothing in the contract even remotely suggests that employees or a Local Union aggrieved by Joint Committee approval of a change of operations may challenge such action through the grievance procedure. The grievance procedure is nowhere made applicable to such action. The contract contains no provision for presentation to the Joint Committee, or any other tribunal, of a complaint by a local union or by aggrieved employees that approval of the Joint Committee was obtained by fraud or was otherwise unauthorized by the contract.

Moreover, the Joint Committee is the highest tribunal provided in the contract even for disposition of "grievances." App. A to Complaint, Article 43, Sections 1 and 2, pp. 61-62; App. 12a-13a. In its motion to dismiss respondent asserted (J.A. 16a, par. (4)):

> "The Change of Operations was approved by the Central States Area Joint Committee * * * and the approval constitutes a settlement of all rights arising out of the contract and relating to the Change of Operations.
>
> "The instant complaint seeks remedies outside the scope of this settlement and must, therefore, be dismissed."

Thus, as the complaint alleged (App. 3a; J.A. 8a, par. 22), Joint Committee approval of respondent's request "exhausted the contractual grievance procedures" unless, as the court below held, *Maddox* imports into the exhaustion requirement a "primary jurisdiction" rule, which, as a matter of law, forecloses recourse to courts under Section 301 until the adjudicating or amending authority is afforded "an opportunity to rule on [the] contention that its approval was procured by means of fraudulent misrepresentation * * *" (App. 3a), *even though the contract itself does not so provide.*

3. Respondent concedes that the imported "primary jurisdiction" requirement is inapplicable where the Union is charged with fraud or breach of the duty of fair representation, but argues for its application where the Joint Committee is allegedly a victim of employer fraud, on the theory that *Maddox* requires the victimized employees to afford the Union "the opportunity to [litigate the fraud claim] in their behalf" (Opp. 4-5, 6, 8). But nothing in *Maddox*, and none of the cases respondent cites, holds or even implies that aggrieved employees are barred from litigating on their own behalf their claim that an arbitration award or contract amendment is ineffective to alter vested contract rights because it was procured by fraud. Such a rule would conflict with the individual right of contract enforcement upheld in *Smith v. Evening News*, 371 U.S. 195, 198-200 and *Humphrey v. Moore*, 375 U.S. 335, 343. It would also conflict with the teaching of *Vaca v. Sipes*, 386 U.S. 171, 185, that employer conduct which "amounts to repudiation" of contractual procedures estops the employer from relying on "unexhausted grievance and arbitration procedures." Fraud upon the Joint Committee is the clearest kind of repudiation, *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238. Moreover, respondent's theory is inconsistent with *Vaca's* recognition *(ibid)* that "there may of course be other" situations to which the exhaustion requirement is inapplicable.

The overbroad interpretation of *Maddox* urged by respondent and adopted by the court below is not only unsupported by legal and labor policy considerations (Pet. pp. 6-7); it would seriously undermine industrial peace. Thus, it would compel the bargaining agent to choose between bringing a charge of fraud against the employer, thereby disrupting and jeopardizing the entire union-employer relationship, or incurring suspicion of complicity and a possible charge of unfair representation from its constituents by refusing.

Manifestly, a charge that the employer has procured a contract amendment or arbitration award by fraud upon the amending or adjudicating authority is not, in normal parlance, a "grievance" based "simply on the contract" (*Maddox*, 379 U.S. at 657); it is a far cry indeed from the "normal situation" (379 U.S. at 653) to which *Maddox* is confined.

Respectfully submitted,

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